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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 337

BORGE JORGENSEN, Petitioner

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. _____

BORGE JORGENSEN, Petitioner

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Claims entered in this case on May 8, 1957 as granted in part the motion of the United States for judgment on the pleadings and thereby dismissed so much of petitioner's complaint as sought to recover a gift tax claimed to have been unlawfully collected.

Opinion Below

The opinion of the Court of Claims and the dissenting opinion of Judge Laramore in which Judge Littleton joined (Tr. 67-74) have not yet been reported and are printed in the Appendix, *infra*, pp. 9-17.

Jurisdiction

The judgment of the Court of Claims was entered on May 8, 1957 (Tr. 67); p. 9, *infra*.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

Question Presented

Whether the principle enunciated by this Court that the federal gift and estate tax statutes are in *pari materia* and must be construed together applies to Sections 863(b) and 1000(b) of the Internal Revenue Code of 1939 so as to exclude from property subject to a gift tax, as not being property situated within the United States, moneys deposited with a bank in the United States by a nonresident alien not engaged in business in the United States.

Statute Involved

The Internal Revenue Code of 1939, 53 Stat. 1, provides in pertinent part as follows:

Sec. 863. Property without the United States.

The following items shall not, for the purpose of this subchapter, be deemed property within the United States:

* * * * *

(b) **Bank Deposits.**—Any moneys deposited with any person carrying on the banking business, by or for a nonresident not a citizen of the United States who was not engaged in business in the United States at the time of his death.

(53 Stat. 131, 26 U.S.C. 1952 ed., Sec. 863.)

Sec. 1000. Imposition of Tax.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. Gift taxes for the calendar years 1932-1939, inclusive, shall not be affected by the provisions of this chapter, but shall remain subject to the applicable provisions of the Revenue Act of 1932, except as such provisions are modified by legislation enacted subsequent to the Revenue Act of 1932.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

(53 Stat. 144, 26 U.S.C. 1952 ed., Sec. 1000.)

Statement

The jurisdiction of the Court of Claims was invoked to recover from the United States a federal gift tax unlawfully and erroneously collected.

The petitioner's father Neil C. Jansen, a citizen and resident of Denmark, who was not engaged in business in the United States, had for many years prior to World War II maintained in his name a cash account with the Guaranty Trust Company of New York. (Tr. 3, 14). In March 1940 he told the petitioner that he gave him this account but that he did not wish to confirm the gift in writing because he feared such written confirmation might fall into the hands of the Germans who, if they invaded Denmark and discovered the existence of the account, might compel its transfer to them (Tr. 3-4, 14-15). However, on

April 8, 1940, the day Germany invaded Denmark, Mr. Jansen, in order to prevent the Germans from ascertaining the ownership of the account, wrote the bank requesting it to subhead the account "Foreign Syndicate Separate Account" (Tr. 4, 16).

When Germany invaded Denmark, the President issued Executive Order No. 8389 (5 F. R. 1400) freezing property then in the United States belonging to Danish nationals. By the terms of the Order the transfer of the account to the petitioner on the books of the bank was prohibited, except as licensed by the Secretary of the Treasury (Tr. 4, 15).

In January 1946 Mr. Jansen advised the bank that the petitioner was the owner of the account (Tr. 4-5, 16). On October 5, 1949 the Office of Alien Property, then in charge of administering the freezing controls, issued a license authorizing the bank to transfer the account to the petitioner (Tr. 5, 17).

On October 11, 1949 the Collector of Internal Revenue served on the bank a notice of tax lien, warrant for distraint and levy on the account in the sum of $36,133.08, representing an alleged gift tax imposed of $23,908.37 plus $12,224.71 as interest from March 15, 1941 (Tr. 5-6, 17). In December 1949 the bank paid to the Collector of Internal Revenue the alleged gift tax and interest thereon and then charged the petitioner's account therewith (Tr. 6, 17-18).

The petitioner filed a claim for refund of the total amount paid (Tr. 6, 12). The Commissioner of Internal Revenue refunded $11,724.06 representing interest from December 7, 1941 to December 30, 1949 and disallowed the remainder of the claim consisting of the alleged gift tax and interest for the period from March 15, 1941 to December 7, 1941 (Tr. 7, 22-28).

The petitioner then brought an action in the Court of Claims to recover $24,951.01, the amount disallowed. The

United States answered (Tr. 29) and moved for judgment on the pleadings (Tr. 37).

So far as is pertinent here, the court below, dividing 3 to 2, granted the Government's motion for judgment with respect to so much of the complaint as sought to recover the amount of the gift tax paid (Appendix, *infra*, p. 14). The majority refused to construe Sections 863(b) of the estate tax and 1000(b) of the gift tax together and held that the transfer of the account was a taxable gift. This conclusion, said the majority, is in accord with *Harris* v. *Commissioner*, 178 F. 2d 861 (2d Cir.) (Judge Swan, dissenting), reversed on other issues, 340 U. S. 106 [1950] (Appendix, *infra*, p. 13).

The two dissenting judges said (Appendix, *infra*, pp. 16-17):

> "To tax the gift in a case such as this would be to tax property donated before death which would not have been taxed if held until death. The estate tax is the basis of taxation in this field, the gift tax being only supplementary thereto. *Estate of Sanford* v. *Commissioner, supra*, at 44; *Merrill* v. *Fahs, supra*, at 311. Thus, it would seem inconsistent to levy a tax under the gift tax statute (the statute designed to prevent evasion of the estate tax statute) on a transfer of property when the property was specifically exempt from tax under the estate tax statute. The estate tax statute has expressly defined what constitutes property located within or without the United States in the case of a nonresident alien and it should, on the basis of the aforementioned Supreme Court decisions, be carried over to and applied in a gift tax situation.
>
> "To reach the result I have suggested herein, would not 'produce a result incongruous with the recognized provisions of the estate tax statute,' *Estate of Sanford, supra;* rather, it would produce a result entirely consistent therewith."

* * * *

"The taxpayer should be entitled to recover the amount of gift tax paid because of this alleged transfer of property by gift."

Reasons for Granting the Writ

The decision of the court below conflicts in principle with applicable decisions of this Court.

This Court has repeatedly enunciated as a rule of interpretation of the federal gift tax that it must be construed *in pari materia* with the estate tax. *Burnet* v. *Guggenheim*, 288 U. S. 280 [1933], *Estate of Sanford* v. *Commissioner*, 308 U. S. 39 [1939], *Merrill* v. *Fahs*, 324 U. S. 308 [1945] and *Harris* v. *Commissioner*, 340 U. S. 106 [1950].

In *Estate of Sanford* v. *Commissioner*, *supra*, this Court said at page 42:

"In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions."

and again, at page 44:

"* * * The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together. *Burnet* v. *Guggenheim*, *supra*; 286. An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death."

There is no decision of this Court which states an exception to this principle, or which provides a rationale for

such an exception. Indeed, the Government has heretofore urged this principle upon this Court for in *Merrill* v. *Fahs, supra,* the Solicitor General argued in the Government's brief, at pages 17 and 51, that in accordance "with the policy of integration of the estate and gift taxes, Congress designed the gift tax to be construed with reference to and consistently with the estate tax."

Although the court below showed an awareness of this long-standing principle (Appendix, pp. 11-12, 15-17), the majority of the court refused to apply it. In so doing, the majority advanced no persuasive reason for refusing to follow a rule of this Court which has long served to guide both the Government and taxpayers in their understanding of the federal gift tax. The decision of the majority of the Court of Appeals for the Second Circuit in *Harris* v. *Commissioner,* 178 F. 2d 861, which the majority of the court below apparently followed, is not persuasive for, as the Record there indicates (see *Harris* v. *Commissioner,* 10 T. C. 741, 742-743), the donor and donee were living in the United States when the former gave the latter the amounts from her bank accounts. Furthermore, the majority in *Harris* took the view that (p. 863) "any alien who knew that his deposits were subject to a gift tax would withdraw them before making a gift, and the tax would at best catch only the unwary". But in the instant case the bank account could not be withdrawn abroad because of Executive Order No. 8389, and if withdrawn prior to blocking it would have come under the control of the Germans.

Unless this Court reviews the decision of the court below, the achievement of certainty, which is an essential requirement of a tax law based on the theory of voluntary compliance, will be hindered. The meaning and scope of the prior pronouncements of this Court that the gift tax must be construed consistently with the estate tax will no longer be clear to those who seek to plan their affairs and knowingly comply with the tax laws, especially nonresident

aliens not doing business in the United States who desire to make gifts of United States bank deposits which are treated as tangible rather than intangible property and as having a situs for tax purposes in the depository jurisdiction. See *Blackstone* v. *Miller*, 188 U. S. 189, 205 [1903]; 47 Harv. L. Rev. 307, 312.

If such confusion is to be avoided, a decision that there are exceptions to the long-established principle of construction, must come from this Court. Moreover, to insure continued voluntary compliance with the federal gift tax laws, reasons for such a departure from accepted rules must be articulated to guide those whose conduct is to be governed by the law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY I. FILLMAN,
Counsel for Petitioner.

July 31, 1957.

Appendix

IN THE

UNITED STATES COURT OF CLAIMS

No. 540—53

(Decided May 8, 1957)

BORGE JORGENSEN v. THE UNITED STATES

Mr. Henry I. Fillman for the plaintiff.

Mr. Gilbert E. Andrews, with whom was *Mr. Assistant Attorney General Charles K. Rice,* for the defendant. *Mr. James P. Garland* was on the brief.

ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

MADDEN, *Judge,* delivered the opinion of the court:

The plaintiff was required to pay a Federal gift tax upon a bank account in a New York bank, which account was given him by his father. He claims that the gift was not subject to the tax, and sues for the refund of the tax.

The plaintiff's father Niels C. Jansen, was a citizen and resident of Denmark. He had for many years prior to World War II maintained a bank account in his own name with the Guaranty Trust Company of New York. In March 1940, after the invasion of Denmark by the Nazis, Mr. Jansen told the plaintiff that he was giving him the bank account, but that he would make no written confirmation of the gift, because such evidence might fall into the hands of the Germans who might claim the account if they learned of it. Mr. Jansen advised the Guaranty Trust Company to subhead the account "Foreign Syndicate Separate Account." In 1945 after the liberation of Denmark Mr. Jansen advised the bank that the plaintiff was the owner of the account. In 1949 the bank was given a

license by the Office of Alien Property to transfer the account to the plaintiff.

In October 1949 the Federal tax authorities served on the bank a notice of a levy of a gift tax on the account in the amount of $36,133.08, consisting of $23,908.37 of principal and $12,224.71 of interest. These sums were paid out of the account. The plaintiff filed a claim for refund, and $11,724.06 of the interest was refunded, for a reason that will be stated hereinafter. The rest of the claim for refund was rejected.

The plaintiff says that the gift was not taxable because the donor was neither a resident nor a citizen of the United States nor was he doing business in the United States. That contention cannot be based upon the language of the gift tax statute itself, which, as it appeared in the Internal Revenue Code of 1939, 26 U. S. C. 1952 ed. sec. 1000, said:

> SEC. 1000. IMPOSITION OF TAX.
>
> (a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. Gift taxes for the calendar years 1932-1939, inclusive, shall not be affected by the provisions of this chapter, but shall remain subject to the applicable provisions of the Revenue Act of 1932, except as such provisions are modified by legislation enacted subsequent to the Revenue Act of 1932.
>
> (b). The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

The statute would seem to apply to the gift here in question. The plaintiff urges in his brief that it does not apply

because, it says, money deposited in a bank in the United States by a nonresident alien not engaged in business in the United States is not "property situated within the United States" within the meaning of the gift tax statute. This would seem to be a rather violent construction of the language of the statute. The statute expressly mentions intangible property, and the state of the debtor or obligor of a chose in action has the power to tax the chose in action to the creditor or obligee if it chooses to do so. It is not possible to gather from section 1000 alone any Congressional idea that a bank account in New York is not "situated within the United States," no matter who owns the account.

The plaintiff's justification for its claimed construction of section 1000 is that the gift tax statute must be interpreted in harmony with the estate tax statute, and that if it is so interpreted, its literal meaning is substantially modified. The gift tax statute was enacted to prevent evasion of the estate tax statute. Before the enactment of the gift tax statute in 1924 wealthy persons were making *inter vivos* gifts of their property to the persons who would have taken it by inheritance or by devise if they had held it until their deaths, and thus depriving the Government of estate tax revenue. The Congressional committee reports relating to the gift tax statute bear out the plaintiff's statements as to the reason, or a principal reason, for the enactment of the gift tax statute. See 2 Paul, Federal Estate and Gift Taxation (1924) sec. 15.04. The plaintiff cites *Burnet* v. *Guggenheim*, 288 U. S. 280, 286; *Sanford's Estate* v. *Commissioner*, 308 U. S. 39, 42, 44; and *Merrill* v. *Fahs*, 324 U. S. 308, in which the Court says that the gift tax statute and the estate tax statute are *in pari materia*, and the gift tax statute should be construed in the light of the text and the judicial interpretations of the estate tax statute.

In *Guggenheim*, a donor had in 1917, before the enactment in 1924 of the fist gift tax statute, conveyed property upon a revocable trust. In 1925 he canceled the power of

revocation. A gift tax was then imposed, and the taxpayer claimed that the gift had taken place in 1917, and hence was tax-free. The Court said that if such a conveyance was a gift in 1917 within the meaning of the statute, a similar conveyance after 1924 would be a gift, and taxable as a gift, but it would also be taxable to the donor's estate upon his death because of his continuing control over the property. The Court thus looked to the estate tax statute and found a reason for concluding that Congress did not intend that a revocable trust should constitute a gift, within the meaning of the statute. *Sanford's Estate* presented a similar problem as to whether a transaction which might or might not be regarded as a gift should be so regarded, if to do so would produce a result incongruous with the recognized provisions of the estate tax statute.

In *Merrill* v. *Fahs* the question was whether when, pursuant to a premarital contract, a husband transfers money to his wife in consideration of her relinquishment of her marital rights in his property and estate, the transfer is for a consideration, hence not a gift and not taxable. The gift tax statute said that a transfer should be a gift and taxable unless made for an adequate and full consideration." The estate tax statute in its provisions relating to claims deductible from the estate, and to transfers in contemplation of death, used similar language. But Congress in the Revenue Act of 1932, section 804, relating to the estate tax, expressly provided that a transfer of marital rights should not be consideration in "money or money's worth." No such explicit language was used in the gift tax statute. The Court held, however, that, because of the close interrelation between the two statutes, the comparable transactions were intended by Congress to receive similar treatment in applying the two statutes, and the transfer was a taxable gift.

In the three cases discussed the Court was dealing with statutory language readily susceptible of the interpretation which the Court gave it. In arriving at its interpretation, the Court was influenced by the fact that the interpretation which it gave the gift tax statute made it congruous with the estate tax statute.

In the instant case, section 1000 is really not susceptible of the interpretation which the plaintiff asks us to give it. Nor is there serious disharmony between the natural meaning of the words of section 1000 and section 863 (b) of the Revenue Code of 1939 relating to the estate tax. To be sure, section 863 (b) would have made this bank account nontaxable to the estate of Mr. Jansen if he had continued to own it until his death, and had continued to be a nonresident and a non-citizen of the United States, not doing business in the United States. The purpose of this provision in the estate tax statute was to put American banks and insurance companies on a basis on which they could compete with foreign companies for the money of foreigners. To give effect to section 863 (b) it is not necessary to read into section 1000 a Congressional intention that a gift of such a chose in action, made long before the owner's death, and after which he might well become a citizen or resident of the United States, or might engage in business here, should be similarly tax-free.

In the Revenue Act of 1954, in section 250 (a), gifts such as the one here in question were expressly made exempt from the gift tax. The Government points to language in the Committee reports stating that this was a change in existing law. We do not place great reliance upon such a statement by a later Congress as to what was intended by a statute enacted by an earlier one. Frequently the intention of the later Congress may be to make clear what was doubtful in the earlier statute.

Our conclusion that this gift was taxable is in accord with that of the Court of Appeals for the Second Circuit in *Harris* v. *Commissioner*, 178 F. 2d 861, reversed on other grounds, 340 U. S. 106.

The plaintiff urges that, even if the gift here involved was taxable, the gift did not take place until October 5, 1949, when the Office of Alien Property issued its license to the bank to transfer the account to the plaintiff. Since the gift tax was paid by the bank shortly thereafter the

plaintiff says that no interest should have been charged on the tax. As we have seen, the Government orginally collected interest from March 15, 1941, which would have been the return date for a gift made in 1940, to the date of payment of the tax in December 1949. Later, as we have seen, the Government refunded most of this interest, concluding that since the plaintiff was out of the country after December 6, 1941, the period of time beginning December 7, 1941, and ending December 30, 1949, should, under the applicable statute and Treasury decisions be disregarded in determining whether the gift tax return was timely filed. The Government, however, kept the interest for the period March 15, 1941, to December 7, 1941, amounting to $1,042.64.

The plaintiff says that since the President, on the invasion of Denmark by the Nazis, blocked any property in the United States belonging to Danish nationals, from transfer on or after April 8, 1940, and since in 1942 the Secretary of the Treasury issued a ruling that any attempt to transfer or make a gift of blocked property should be null and void, unless the transfer or gift was licensed, and since the license for the transfer to the plaintiff was not issued until October 5, 1949, the gift did not take place until that date. We think the plaintiff is right. An attempted gift which is specifically forbidden by valid regulations of the Government is not the kind of completed gift which is taxable. As the Court said in *Guggenheim, supra,* "a gift is not consummate until put beyond recall."

The Government's motion for judgment on the pleadings is denied in part and granted in part.

Although plaintiff has not moved for judgment, he is entitled to recover the $1,042.64 in interest which the Government has retained. In the absence of anything further from the parties within fifteen days of this date, judgment will be entered for plaintiff in that sum together with interest thereon as provided by law.

It is so ordered.

WHITAKER, *Judge,* and JONES, *Chief Judge,* concur.

LARAMORE, *Judge*, dissenting:

I respectfully dissent.

The plaintiff bases his case on the proper application of subsection (b) of section 1000 of the Internal Revenue Code of 1939, quoted in full in the majority opinion, which provides for the taxation of the type of property here in question but further provides that "in the case of a nonresident not a citizen of the United States, [the tax] shall apply to a transfer only if the property is situated within the United States." This clause is not defined in the gift tax statute itself, hence, without more it would appear that a bank account in a New York bank is property within the United States and thus subject to the assessment of a gift tax upon its transfer in gift.

Taxpayer, however, alleges that because of other sections of the Internal Revenue Code of 1939, the bank account is exempt from a gift tax and cites section 863 which reads as follows:

> The following items shall not, for the purpose of this subchapter, be deemed property within the United States:
>
> * * * * * * * * *
>
> (b) Bank Deposits.—Any moneys deposited with any person carrying on the banking business, by or for a non-resident not a citizen of the United States who was not engaged in business in the United States at the time of his death. * * *

The issue then, as it appears to me, is the correct interpretation and application of the clause "property * * * situated within the United States" as used in section 1000 (b) of the Code.

As noted in the majority opinion, the Supreme Court on numerous occasions held that the gift tax statute and the estate tax statute are *in pari materia* and that the gift tax should be construed in the light of the text and judicial in-

terpretation of the estate tax statute. *Merill* v. *Fahs*, 324 U. S. 308 (1945); *Estate of Sanford* v. *Commissioner*, 308 U. S. 39 (1939); *Burnet* v. *Guggenheim*, 288 U. S. 280 (1933). Accordingly, if the term "property * * * situated within the United States" is defined in the estate tax statute in a way that would place a meaning on it different from that which would ordinarily be implied therefrom, that definition must also apply to the gift tax statute unless otherwise negatived therein. It is not so negatived by the gift tax statute.

Certainly, the clause cannot be given one meaning in the one statute and a different meaning in the other, unless expressly done so by the statutes themselves, and this for the very reason asserted by the majority as being the purpose of the gift tax statute, to wit, to prevent evasion of the estate tax statute. If the bank deposit in the case at bar was excluded by specific statutory provision from the estate of a deceased nonresident alien, there could have been no evasion of the estate tax by making an *inter vivos* transfer of the property. The majority points out that before the enactment of the gift tax statute in 1924 wealthy persons were making *inter vivos* gifts of their property to the persons who would have taken it by inheritance or by devise if the donor had held the property until death and thus deprived the Government of estate tax revenue. To prevent this, the gift tax statute was passed with the result that, in effect, the assessment of a gift tax on a donor (the prospective decedent whose estate would have been taxed on the property given away if still held at death) is a downpayment on the estate tax which otherwise would have had to have been paid. *Burnet* v. *Guggenheim*, *supra* at 286.

To tax the gift in a case such as this would be to tax property donated before death which would not have been taxed if held until death. The estate tax is the basis of taxation in this field, the gift tax being only supplementary thereto. *Estate of Sanford* v. *Commissioner*, *supra* at 44;

Merrill v. *Fahs, supra* at 311. Thus, it would seem inconsistent to levy a tax under the gift tax statute (the statute designed to prevent evasion of the estate tax statute) on a transfer of property when the property was specifically exempt from tax under the estate tax statute. The estate tax statute has expressly defined what constitutes property located within or without the United States in the case of a nonresident alien and it should, on the basis of the aforementioned Supreme Court decisions, be carried over to and applied in a gift tax situation.

To reach the result I have suggested herein would not "produce a result incongruous with the recognized provisions of the estate tax statute," *Estate of Sanford, supra;* rather, it would produce a result entirely consistent therewith.

Insofar as I have been able to determine, this problem has been ruled on only once previously and that by the Second Circuit in *Harrison* v. *Commissioner,* 178 F. 2d 861, reversed on other grounds, 340 U. S. 106 (1950). The court in that case, with a dissenting opinion, reasoned somewhat the same as the majority in the case at bar. It went to the Supreme Court but that part of the case which related to our problem here was not before that Court. The order granting *certiorari* provided the hearing would be limited to the other two issues of the case.

The taxpayer should be entitled to recover the amount of gift tax paid because of this alleged transfer of property by gift.

LITTLETON, *Judge,* joins in the foregoing dissenting opinion.

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BORGE JORGENSEN, PETITIONER

v.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 337

BORGE JORGENSEN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 9-14) and the dissenting opinion of Judge Laramore (Pet. 15-17) have not yet been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered May 8, 1957. (Pet. 9, 14.) The petition for a writ of certiorari was filed August 2, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether the gift of a bank deposit situated within the United States by a nonresident alien not doing busi-

ness within the United States is subject to the gift tax under Section 1000 of the Internal Revenue Code of 1939.

STATUTES INVOLVED

Sections 812(b)(3) and (4), 863(b), 1000(a) and (b), and 1002 of the Internal Revenue Code of 1939 are set forth in the Appendix, *infra*, pp. 9-11.

STATEMENT

The pertinent facts, as set forth in the Court of Claims opinion (Pet. 9-14), appear as follows:

The petitioner's father, Niels C. Jansen, was a citizen and resident of Denmark. (Pet. 9.) He was not doing business in the United States. (Pet. 10.) He had for many years prior to World War II maintained a bank account in his own name with the Guaranty Trust Company of New York (hereinafter called Guaranty). In March, 1940, after the invasion of Denmark by the Nazis, Mr. Jansen told the petitioner that he was giving him the bank account, but that he would make no written confirmation of the gift, because such evidence might fall into the hands of the Germans who might claim the account if they learned of it. Mr. Jansen advised Guaranty to subhead the account "Foreign Syndicate Separate Account." (Pet. 9.)

In 1945, after the liberation of Denmark, Mr. Jansen advised Guaranty that petitioner was the owner of the account. In 1949, the bank was given a license by the Office of Alien Property to transfer the account to the petitioner. (Pet. 9-10.) Under these facts, the Court of Claims held (and this issue is not contested here) that the gift took effect on October 5, 1949, the date of the license to the Bank. (Pet. 14.)

In October, 1949, the federal tax authorities served on Guaranty a notice of a levy of a gift tax on the bank account in the amount of $36,133.08, consisting of $23,908.37 of principal and $12,224.71 of interest. The entire amount was paid out of the account. (Pet. 10.) Petitioner filed a claim for refund, and $11,724.06 of the interest applicable to the period from December 6, 1941, to December 30, 1949, was refunded, with the remainder of the claim being rejected. (Pet. 10, 14.) Under the Court of Claims' partial denial of respondent's motion for judgment on the pleadings, judgment was entered for petitioner in the amount of $1,042.64, representing the remaining interest paid to and retained by the Government. (Pet. 14.) Accordingly, the principal amount of the gift tax paid—*viz.* $23,908.37—is the amount here in issue. (Pet. 10.)

ARGUMENT

The decision of the majority of the Court of Claims against the asserted exemption from the gift tax of a bank account in a United States bank owned by an alien nonresident, not engaged in business within the United States, is plainly correct, and no reason is shown to warrant further review by this Court. There is no conflict between the decision below and that of any Court of Appeals on the same matter, nor with applicable decisions of this Court. It may be noted that, although the gift tax has been in effect since 1932,[1] the exemption here claimed has, so far as is known, been asserted only once before. The same arguments raised on behalf of the taxpayer were rejected by the Court of Appeals

[1] There was also a gift tax from 1924 to 1926. See *Burnet v. Guggenheim*, 288 U.S. 280.

for the Second Circuit in *Harris* v. *Commissioner*, 178 F. 2d 861, reversed on other issues, 340 U.S. 106.[2]

Adopting the interpretation accorded Section 1000 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 10-11) in the *Harris* case, *supra*, the Court of Claims correctly concluded (Pet. 13):

> In the instant case, section 1000 is really not susceptible of the interpretation which the plaintiff asks us to give it. Nor is there serious disharmony between the natural meaning of the words of section 1000 and section 863(b) of the Revenue Code of 1939 relating to the estate tax. To be sure, section 863(b) would have made this bank account nontaxable to the estate of Mr. Jansen if he had continued to own it until his death, and had continued to be a non-resident and a non-citizen of the United States, not doing business in the United States. The purpose of this provision in the estate tax statute was to put American banks and insurance companies on a basis on which they could compete with foreign companies for the money of foreigners. To give effect to section 863(b) it is not necessary to read into section 1000 a Congres-

[2] In the *Harris* case, *supra*, a petition for certiorari was filed with respect to three questions; the first of which presented the instant issue, as follows:

> 1. Whether money deposited in American banks by or for a nonresident alien, not engaged in business in the United States, is exempt from the gift tax as property without the United States.

On March 27, 1950, certiorari was granted as to questions 2 and 3, which are not here applicable, but was not granted as to question 1. 339 U.S. 917. Subsequently, rehearing of the petition for certiorari as to question 1 was denied on April 24, 1950. 339 U.S. 946.

sional intention that a gift of such a chose in action, made long before the owner's death, and after which he might well become a citizen or resident of the United States, or might engage in business here, should be similarly tax-free.

Judge Learned Hand's opinion in the *Harris* case, *supra*, sets forth (pp. 862-864) the legislative history and the statutory basis of the Second Circuit's ruling that the failure by Congress to provide in the gift tax for an exemption of deposits in American banks belonging to nonresident aliens not engaged in business in the United States, such as is explicitly provided for in the estate tax (Section 863(b) of the Internal Revenue Code of 1939, Appendix, *infra*, p. 10), represented a deliberate legislative choice. This construction applies with equal force to the instant case. Since the donor of the bank deposit in each case was a nonresident alien, not engaged in business in the United States, it is immaterial where the donor was living at the time the gift was made. For federal gift tax purposes, it obviously makes no difference whether the nonresident alien, who is not doing business, is visiting in the United States on a temporary visa or is residing abroad.

Merrill v. *Fahs*, 324 U.S. 308, upon which petitioner relies (Pet. 6-7), affords him no support. The settled principle is, of course, that the gift tax is supplementary to the estate tax, that the two are in *pari materia*, and must be construed together.[3] Here, we

[3] While the prevention or compensation for avoidance of the estate tax is an important purpose of the gift tax, this is not its only purpose. Discouraging family distributions, so as to avoid

contend that the phrase substantially identical to both taxes, namely, property "situated in the United States" (Internal Revenue Code of 1939: (estate tax) Sections 861(a), 864(a); (gift tax) Section 1000(b)) is to receive identical construction, namely, to comprehend deposits of alien nonresidents in American banks. The estate tax statute was amended in 1921 expressly to except such deposits (Revenue Act of 1921, c. 136, 42 Stat. 227, Section 403(b)(3)); the amendment was no mere clarification or gloss of the existing language (*Burnet* v. *Brooks*, 288 U.S. 378, 388-389, 394-395), but an explicit exception of that which would otherwise have been taxed as property 'situated in the United States". The exception was never carried over into the gift tax. On the other hand, in *Merrill* v. *Fahs*, *supra*, as this Court pointed out (pp. 312-313), even without the "specific provision" contained in the estate tax only,[4] Congress undoubtedly intended the language common to both taxes of "adequate and full consideration in money or money's worth" (Internal Revenue Code of 1939, Section 812(b), Section 1002, Appendix, *infra*, pp. 9-10, 11) to exclude relinquishment of dower and other marital rights explicitly described in the spe-

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high income surtaxes, is, for example, another recognized purpose. *Merrill* v. *Fahs*, *supra*, p. 313. The transfer here of Mr. Jansen's bank account to the petitioner, his son, might fall within the latter aspect of the gift tax, since, as the Court of Claims pointed out (Pet. 13), after the making of the *inter-vivos* gift, Mr. Jansen "might well become a citizen or resident of the United States, or might engage in business here." Such a change of status would, of course, render the donor liable to pay federal income taxes.

[4] Section 303(a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 805 of the Revenue Act of 1932, c. 209, 47 Stat. 169, now found in Section 812(b) of the Internal Revenue Code of 1939.

cific provision peculiar to the estate tax. As the legislative history and the course of judicial decision discussed in the *Merrill* opinion demonstrate (p. 312), "Plainly, the explicitness was one of cautious redundancy to prevent 'subversion of the legislative intent'."

Thus, the *Merrill* case presents a clear contrast to the statutory situation presented in *Harris* v. *Commissioner, supra,* and here, for the purpose of the specific provision involved in the instant case (Section 863 (b)) was to create an exception to the coverage comprehended in the language common to both statutes. Here, as in the *Merrill* case, the common phrase received the same interpretation by the Court of Claims below, but an express exception to it contained in the estate tax, strictly to be construed as a tax exemption, was not extended by implication to the gift tax. (Pet. 13.) Emphasizing the practical considerations which could result in a donor's loss of his tax status (as a nonresident alien, not doing business in the United States) between the time of making the *inter vivos* gift and the time of death, the Court of Claims properly held that the omission of the exemption from the gift tax should not be supplied by recourse to the purpose which actuated the exclusion in the estate tax. (Pet. 13.) The economic consequences of the incidence of the gift tax and those of the estate tax are not identical, and Congress had many reasons for not regarding as appropriate in the one case an exception which it created in the other.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1957.

APPENDIX

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(b) *Expenses, Losses, Indebtedness, and Taxes.*—Such amounts—

* * * * *

(3) for claims against the estate,

(4) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate, * * *

* * * * *

as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes. The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth. * * *

For the purposes of this subchapter, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth."

* * * * *

(26 U.S.C. 1952 ed., Sec. 812.)

SEC. 863. PROPERTY WITHOUT THE UNITED STATES.

The following items shall not, for the purpose of this subchapter, be deemed property within the United States:

* * * * *

(b) *Bank Deposits.*—Any moneys deposited with any person carrying on the banking business, by or for a nonresident not a citizen of the United States who was not engaged in business in the United States at the time of his death.

(26 U.S.C. 1952 ed., Sec. 863.)

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. * * *

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case

of a non-resident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

(26 U.S.C. 1952 ed., Sec. 1000.)

SEC. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

(26 U.S.C. 1952 ed., Sec. 1002.)

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